

SUPREME COURT OF NIGERIA
21ST JANUARY, 1994. SC.145/1991.
CORAM: M.L. UWAIS, I.L. KUTIGI, U. MOHAMMED,
Y. O. ADIO, A. I. IGUH, JJSC.

SUNDAY BARIDAM APPELLANT

V

THE STATE RESPONDENT

APPEALS - Criminal procedure - where there is no miscarriage of justice or violation of any principles of law - concurrent findings of the courts below amply supported by evidence - not to be interfered with.

CRIMINAL INVESTIGATION - Murder - Police investigation - attacked by appellant - when investigation is held to be satisfactory and normal

CRIMINAL LAW - Murder - self defence - when there is evidence as to what led to death of deceased - whether Appellant acted in self defence

CRIMINAL PROCEDURE - Failure to prove any facts in favour of the accused - when prosecution is held to have discharged its burden of proof

EVIDENCE - Criminal procedure - murder - instance of basing conviction on the evidence of one credible witness - when held to be proper

EVIDENCE - Criminal procedure burden of proof on the prosecution - whether fully discharged

JUDGMENTS - Criminal trial - allegation by the accused that the decisions of the two lower courts were perverse - when not to be upheld

FACTS

The Appellant was charged with the offence of murder before the High Court of Rivers State, Bori. Under the pretext that his motor cycle had broken down, Appellant went to the house of Doctor Gbarade (P.W. 2), a motor cycle mechanic and invited him to repair it. P.W. 2 unsuspectingly assembled his tools and followed the Appellant. About 200 yards from the house of P.W. 2, the Appellant accused him of befriending his girl friend and slapped his face. In spite of P.W. 2's denial, Appellant further stabbed him on the chest with a knife. P.W. 2 raised an alarm which attracted the attention of his deceased sister. As soon as the deceased rushed out to see what was happening, the Appellant stabbed her also and ran away.

Whilst P.W. 2 fell down unconscious, the deceased died on the spot. Appellant denied the charge against him and gave a totally different account. The learned trial Judge found the Appellant guilty as charged, convicted and sentenced him to death by hanging. Appellant's appeal to the Court of Appeal, Port-Harcourt was dismissed. Appellant has now appealed to the Supreme Court Challenging his conviction as being wrongful.

HELD (unanimously dismissing the appeal)

1. A decision is perverse where the trial Judge (inter alia) distorts the facts or evidence in the case so as to tilt the scale of justice in favour of a party, and learned counsel for the Appellant has failed to substantiate in what respect the decision of the two lower courts were perverse. (P.8 L9)
2. There is no miscarriage of justice or a violation of any principles of law or procedure in this case, to justify an interference with the concurrent findings of the courts below as the said findings are amply supported by evidence before the court (P. 10 L2)
3. From the evidence of what led to the death of the deceased which the trial court believed, the Appellant was at no time acting in self defence. (P.11 L30)
4. There was nothing wrong unsatisfactory, or abnormal with the police investigation of this case from the printed record of appeal. (P. 12 L7)
5. Since the evidence of one credible witness (who is not an accomplice) which is accepted and believed by the trial court is sufficient to justify a

conviction, the evidence of the 2nd prosecution witness who was clearly not an accomplice being of such high quality and cogency, the Court of Appeal was perfectly entitled to affirm the Appellant's conviction which was primarily based on that evidence. (P.13 L19)

6. From a close study of the record of proceedings, no facts were proved as alleged in favour of the Appellant whose testimony the learned trial Judge rightly rejected. Thus, the prosecution fully discharged the onus placed upon it by law. (P.13 L30)

REPRESENTATION:

Chief M. Ozekhome with O. Rapu Esq. and
O. C. Igboke Esq. for the Appellant.

Respondent unrepresented.

CASES REFERRED TO

1. Aladesuru and Ors v. The Queen (1955) 3. W.L.R. 515
2. Enitan and Ors v. The State (1986) 3 N.W.L.R. (pt.30) 604 at 608
3. Wankey v. The State (1993) 5 N.W.L.R. (pt.295) 542 at 551
4. Adio v. The State (1986) 2 N.W.L.R. (pt. 24) 581
5. Ibe v. The State (1992) 5 N.W.L.R. 642 at p. 647
6. Imo v. The State (1991) 3 N.W.L.R. (pt 213) 1
7. Ogundiyan v. The State (1991) 3 N.W.L.R. (pt. 181) 519
8. Adimora v. Ajufo & Ors. (1988) 3 N.W.L.R. (pt. 80) 1
9. Ugumba v. The State (1993) N.W.L.R. (pt. 296) at 671
10. Osayame v. The State (1966) N.M.L.R. 388
11. Sanyaolu v. The State (1976) 6 S.C. 37
12. Nwachukwu v. The State (1986) 2 N.W.L.R. (pt. 25) 765
13. Onuoha v. The State (1988) 3 N.W.L.R. (pt. 83) 460
14. Stephen v. The State (1986) 5 N.W.L.R. (pt 46) 979 at 987
15. Onwe v. The state (1975) 9 - 11 SC. 23
16. R. v. Oshunbiyi (1961) 1 All N.L.R. 453
17. Omoaregbe v. The State (1977) 3 F.C.A. 151
18. Bakare v. The State (1987) 1 N.W.L.R. (pt 52) 579
19. Saidu v. The State (1982) 4 S.C. 41 at 68

20. Inspector - General of Police v. M. and K. and Anor (1958) W.N.L.R. 241

21. Onah v. The State (1985) 3 N.W.L.R. (pt. 12) 236 at 237

22. Adamu v. Attorney-General Bendel State (1986) 2 N.W.L.R. (pt 22) 284

5 23. Igbo v. The State (1975) 9 - 11 SC. 129 at 136

24. Ali & Another v. The State (1988) 1 SCNJ 18 at 30 P.W. 2

STATUTE REFERRED TO

Criminal Code s. 319

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LEAD JUDGMENT BY IGUH JSC

The appellant, Sunday Baridam, was on the 21st day of July, 1986 arraigned before the high court of Rivers State, holden at the Bori, charged
15 with the offence of murder contrary to section 319 of the Criminal Code. The particulars of the offence charged are as follows:-

"That you, Sunday Baridam, on the 29th day of July, 1984 at Bionu Village in the Bori judicial Division; murdered Mayii Topie".

20

The appellant pleaded not guilty to the charge; and the trial proceeded.

The prosecution called five witnesses at the trial. The appellant testified in his own defence but called no witnesses.

25

The substance of the case as presented by the prosecution is that the appellant under the pretext that his motor cycle had broken down went to the house of P.W.2, Doctor Gbarade, a motor cycle mechanic on the 29th July, 1984 at about 8.00 p.m and invited him out to repair it. Unsuspectingly, p.w.2 assembled his tools and followed the appellant. Some 200 yards from the
30 house of P.W.2, the appellant accused him of befriending the appellant's girl friend. P.W.2, manhandled him and slapped his face. In spite of the denial, the appellant further stabbed p.w.2, in his chest with a knife whereupon p.w.2, raised an alarm which attracted the attention of his deceased sister, Mayii Topie. As soon as the deceased rushed out to see what was happening, the
35 appellant turned on her and stabbed her also in the chest and ran away. P.W.2, thereafter, fell down unconscious but the deceased died on the spot.

The matter was reported to the police.

The appellant in his own defence denied stabbing or killing the de-

ceased. He also denied stabbing P.W.2 or any other person. He never went to the house P.W.2 on the material date nor did he invite P.W.2 to repair his motor cycle. He did not even see the deceased on the fateful day. According to the appellant, he was riding his bicycle to Bionu village to see his girl friend at about 8.00 p.m. on the material date. On the way at a round-about, he ran into a crowd that neither dispersed nor gave him free passage even though he ran his bell. The crowd asked whom he was. He called his name but they retorted by saying he had come again to carry his girl friend. The crowd attacked and stabbed him with a dagger. In the course of beating him he pulled out his pen knife. P.W.2 tried to recover the knife from him but was injured in the process. The appellant escaped to the police station to make a report. He was at the station when P.W.3 came to report the incident.

The learned trial judge, Ichoku, J. after a meticulous and painstaking review of the evidence on the 11th April, 1988 found the appellant guilty of murder as charged. He was accordingly convicted and sentenced to death by hanging.

Dissatisfied with this judgment of the trial court, the appellant appealed to the Court of Appeal, Port Harcourt Division, against his conviction and sentence. On the 25th January, 1991 the Court of Appeal unanimously dismissed the appeal and affirmed the conviction and sentence passed on the appellant by the trial court. It is against that judgment of the lower court that the appellant has now further appealed to this court.

The appellant filed only one original ground of appeal. This was on the 22nd February, 1991 and it reads as follows:-

"That my sentence and conviction by the Hon. High Court judge and confirmed by the Hon. Justices of the Court of Appeal are altogether unreasonable, unwarranted and cannot be supported in law, having regard to the weight of evidence."

It has been laid down repeatedly that a ground of appeal which complains that the decision of the lower court is "altogether unreasonable, unwarranted and cannot be supported having regard to the weight of the evidence", is not a valid or proper ground of appeal in criminal cases where the required onus of proof on the prosecution is beyond reasonable doubt. What an appellant appealing against his conviction on the facts in a criminal case is required under the law to allege is that the verdict is altogether unreasonable, unwarranted and cannot be supported having regard to the evidence. See Samuel Aladesuru and others v. The Queen (1955) 3 W.L.R. 515, Akanbi Enitan and others v. The State (1986) 3 NWLR (pt.30) 604 at 608 and Wankey v. The state (1993) 5 N.W.L.R. (Pt.295) 542 at 551. It is therefore clear that the above original ground of appeal filed by the appellant is erroneous on

point of law and patently incompetent.

The appellant, however, subsequently obtained the leave of this court to file and argue five additional grounds of appeal. These were duly filed pursuant to the order of court.

Both the appellant and the respondent filed and exchanged their
5 respective written briefs of argument. The respondent in his own brief argued
that the competence of the additional grounds of appeal depended on the
existence of a valid original ground of appeal to which the new grounds are
additional and can therefore be added to. Then respondent then contended
that in as much as the ground of appeal filed by the appellant is incompetent,
10 the additional grounds must also be regarded as incompetent as one cannot
amend nothing or add something to nothing pursuant to the principle, *ex
nihilō nihil fit*.

There can be no doubt that there is tremendous force in this argu-
ment of learned counsel for the respondent. The courts, however, have in
15 appropriate cases shifted away from the narrow technical approach to justice
but rather pursue the course of substantial justice particularly in cases of
appeals against conviction where the capital punishment is involved. Ac-
cordingly this court has been very liberal in allowing additional or amended
grounds of appeal in cases of appeals against conviction carrying a death
20 sentence where the sole original ground is not a proper ground of appeal. See
Akanbi Enitan & others v. The State, *supra*, at page 609. The present appeal
being one against a conviction for the offence of murder which carries capital
punishment and additional grounds of appeal having been filed pursuant to
the leave of this court, I am prepared to hold that the said additional grounds
25 of appeal are not incompetent but valid.

At the hearing of the appeal before us on the 4th November, 1993,
learned counsel for the appellant, Chief M. Ozekhome adopted his brief dated
20th October, 1992 and made oral submissions in amplification thereof. Al-
30 though the respondent filed its brief and was duly served with hearing notice,
it was not represented at the hearing of this appeal.

In the appellant's brief, the following four issues were formulated for
the determination of this court, namely:-

*"1. Whether the judgment of the Bori High Court in Rivers State
35 delivered on the 11th day of April, 1988, and affirmed by the court of Appeal
(Port Harcourt Division) on the 25th day of January, 1991, by which the
appellant was found guilty of murder and sentence to death, is not perverse
or that justice was not miscarried.*

2. Whether the defence of self-defence is available to the Appellant

and that he established same on record.

3. Whether the trial High Court judgment affirmed by the Court of Appeal is safe and satisfactory and ought not to be set aside by the Supreme Court when:

(i) The police investigation leading to the prosecution and conviction was shoddy and wholly unsatisfactory, for the police ought to have taken or recorded the complaint of the appellant on the day of the alleged incident when the Appellant went to the police station to report the attack on him by P.W.2 and others, but because P.W.3 is an influential and powerful traditional ruler in the community, he (P.W.3) at the police station accused the Appellant of the murder of the deceased and the police believed P.W.3, without allowing the Appellant to report the attack on his person.

(ii) The police failed to call a vital and crucial witness, one Dumere Nwako, whose evidence could have decided the case one way or the other.

(iii) There is manifest evidence that the trial High Court judge shut his eyes to proved facts in favour of the Appellant, and the Court of Appeal erroneously affirmed this.

4. Whether on the totality of the evidence before the trial High Court and on record, the Respondent discharged the onus of proof beyond reasonable doubt as required by section 137 of the Evidence Act."

Before us, however, learned counsel for the appellant conceded that issue number four raise in his brief did not appear to relate to any of the valid grounds of appeal before the court. Although it might have related to the original ground of appeal or ground five of the additional grounds of appeal, these grounds, as I have observed, are erroneous on point of law as they both allege that the judgment of the trial court is altogether unreasonable, unwarranted and cannot be supported having regard to "the weight of evidence". See too *Adio v. The State* (1986) 2 N.W.L.R. (Pt.24) 581. Accordingly the said original ground of appeal and ground five of the additional grounds of appeal must be and are hereby struck out as incompetent.

It is trite law that an appellate court can only hear and decide on issues raised in the grounds of appeal filed before it and that an issue which is not covered by the grounds of appeal must be struck out as incompetent. See *Ibe v. The State* (1992) 5 N.W.L.R. (Pt.244) 642 at p.647, *Imo v. The State* (1991) 9 N.W.L.R. (Pt.213); *Ogundiyan v. The State* (1991) 3 NWLR (Pt.181) 519.

Issue number 4 in the Appellant's brief does not relate to any of the grounds of appeal before the court and must be and is hereby struck out as incompetent.

The respondent formulated three issues for determination in its brief. A

close study of these three issues shows that they are sufficiently encompassed by the remaining three issues raised by the appellant in his brief of argument. Accordingly I shall in this judgment confine myself to the first issue raised in the appellant's brief of argument for determination.

5 With regard to the first issue, learned counsel for the appellant argued that the affirmation by the Court of Appeal of the appellant's conviction and sentence is not only perverse but contrary to law and amounts to a miscarriage of justice. A decision is perverse where the trial judge takes into
10 account matters which he ought not to have taken into account or where he shuts his eyes to the obvious or to proved facts in favour of a party, or distorts the facts or evidence in the case so as to tilt the scale of justice in favour of a party. See *Adimora v. Ajufo & other* (1988)3 N.W.L.R. (pt.80) 1. Learned counsel for the appellant however failed to substantiate in what respect the decisions of the trial court or the court below were perverse, or
15 contrary to law or amounted to a miscarriage of justice. Two versions of the incident that resulted in the death of the deceased were presented before the court. These were those of P.W.2 (the star witness) and the appellant. The learned trial Judge in arriving at his findings, elaborately reviewed both versions and had good and cogent reasons for accepting the account of the
20 incident as presented by P.W.2. He rejected the appellant's version which he rightly described as materially inconsistent with and contradictory to his statement to the police (Exhibit' A') In his judgment, the trial court observed *inter alia* as follows:-

25 *"The evidence of the only eye witness is that of P.W.2 who was also a victimHis evidence is quite clear as to what happened that day. Then putting the story of the accused and that of P.W.2 side by side, there is no dispute that the accused came to Bionu that day around 8.00 p.m. at about the time of the incident.*

30 *From the evidence of P.W.1, P.W.3 and P.W.5, it is clear that the scene of incident was not at any road junction but rather near the house of the mother of the deceasedit is interesting to note that under cross-examination, the question was always that Doctor and his friend attacked and damaged the accused motor cycle and not bicycle. It is also note worthy that the accused at the Polke Station, Lumene, was reporting that Doctor and
35 Mayii fought him"*

A little later in his judgment, the learned trial Judge continued as follows:

"I have stated that the evidence of P.W.2 was quite simple and direct. The accused came to him to come and repair his motor cycle. The motor cycle, the accused said, could not move and P.W.2 had to collect his tools

and went along with him. He lived alone in the house.

On going about 200 yards away from his house, the accused held his shirt and questioned him that he was told he was befriending his girl friend. This, P.W.2 denied and accused then slapped his face and he shouted and his sister, Mayii Topie, heard his voice and came out. The accused then brought out the dagger and stabbed him and he shouted that accused had stabbed him with dagger and then the deceased ran down and as asked P.W.2 what happened, what happened and accused then stabbed her and ran away. Then he, P.W.2, did not know himself and then fell down. They were all picked up and taken to the Police Station, Lumene, and from there to the Bori Police Station and Hospital and to Port Harcourt Hospital where P.W.2 was treated

The accused had shown not to be a truthful witness. His testimony before this court, namely, his evidence-in-chief and under cross-examination has shown very serious inconsistenciesIn this court, the accused denied seeing the deceased but in his statement to the Police, he admitted stabbing the deceased. On the foregoing, I have no hesitation and in fact no doubt in my mind in believing the simple and straightforward story of P.W. 2 as the exact story of what happened that day. The accused was but trying to make up a story that Doctor and Mayii fought him....."

I have given a very close study to the above findings of the learned trial Judge and it seems to me beyond dispute that they are amply supported by abundant evidence before that court. The Court of Appeal did also accept these findings of the trial court the following passage of its judgment, namely:-

"Put very briefly, the evidence was that the appellant lured out P.W.2, made false accusations and stabbed him. He turned on the deceased and stabbed her when she came out to see what was happening In my opinion, he was rightly convicted upon the evidence of murdering the deceased "

It is settled law that this court will not normally interfere with the concurrent findings of the two lower courts unless there is some miscarriage of justice or a violation of some principles of law or procedure. See Ugwumba v. The State (1993) 5 NWLR (Pt.296) 660 at 671, Osayame v. The State (1966) NMLR 388, Sanyaolu v. The State (1976) 6 SC 37, Nwachukwu v. The State (1986) 2 NWLR (Pt.25) 765, Onuoha v. The State (1988) 3 NWLR (Pt.83) 460

and Wankey v. The State (1993) 5 NWLR (Pt.295) 542 at 552. There is in this case no miscarriage of justice or a violation of any principles of law or procedure. I can find no justification for interfering with the concurrent findings of the trial court and the court below on the facts of this case. The said findings
5 are amply supported by evidence before the court. I must therefore resolve the first issue for determination against the appellant.

The second issue questions whether the defence of self defence is available to the appellant and whether the same was established by him. There
10 can be no doubt that self defence in an appropriate case is a complete answer to a charge of murder or manslaughter. The appellant, to avail himself of this defence, however, must show that his life was so much endangered by the act of the deceased that the only option that was open to him to save his own life was to kill the deceased. He must show that he did not want to fight and that
15 he was at all material times prepared to withdraw. See Stephen v. The State (1986) 5 NWLR (Pt.46) at 987. The defence of self defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not done by way of self defence. The onus is on the prosecution to disprove the accused's defence of self defence and not on the accused to establish his
20 plea. See Iteshi Onwe v. The State (1975) 9-11 S.C 23; R v. Oshunbiyi (1961) 2 SCNLR 147; (1961) 1 All NLR 453 and Ahusimen Omoregbe v. The State (1977) 3 F.C.A. 151.

In the present case, it is plain to me that the learned trial Judge
25 thoroughly considered the appellant's plea of self defence and arrived at the conclusion that it did not arise in the proceedings. Having reviewed the evidence on both sides, the learned trial Judge concluded as follows:-

*"I have stated that the story of P.W.2, as was substantially corroborated by the accused himself and the evidence of P.W. 1, P.W.3, P.W.4 and P.W.5, all go to show that the story the accused was putting up was but a made up story and very unreliable From the story and account of P.W.2 which I believe, there is thus no issue or question of self defence. The accused was not in any way acting in self defence but rather the accused set
35 out to P.W.2 and enticed him out of his house under the pretext he was going to repair his motor cycle. On the way, about 200 yards from P.W.2's house, the accused held his shirt and twisted it, slapped him after asking if it was true that P.W.2 was befriending his girl friend. P.W.2 denied and the accused stabbed him and while P.W.2 shouted, the deceased rushed down and was*

asking what happened, what happened and the accused then stabbed her. On the above facts which I believe as opposed to the inconsistent stories and different versions of the account as put up by the accused, there is no question of self defence. The accused knew what he was doing and acted promptly. No one attacked him for him to defend himself. He was all the time the one who attacked P.W.2 and the deceased and it was the attack that resulted to the death of the deceased. The question of self defence is thus ruled out." 5

The Court of Appeal in the lead judgment of Omosun, J.C.A with which Ogundare and Onu, J.C.A., as they then were concurred, in dealing with this issue of self defence which was also raised before it stated as follows:- 10

"I say without hesitation that the learned Judge gave adequate consideration to the issue of self defence. The finding is amply supported by evidence. The appellant was neither apprehensive of death or grievous harm to make him fight back, Regina v. Onyeamizu (1958) N.N.L.R. 93 at page 94 to 95. The evidence supported the conviction." 15

I am in entire agreement with the above observation of the Court of Appeal which are supported by abundant evidence before the trial court.

I think it pertinent at this stage to observe that evidence which is properly rejected by a trial court cannot be ground or form the basis of the defence of self defence or indeed, any other defence for that matter. See Bakare v. The State (1987) 1 NWLR (Pt.52) 579. Whether or not a given defence is or may be available to an accused person must be decided against the background of accepted facts or evidence. Evidence that has been properly considered and rejected is of no value or consequence and must accordingly be discountenanced. Once, as in the instant case, the evidence upon which the defence of self defence in issue was founded was sufficiently considered by the trial court and rightly rejected upon good and cogent reasons, such rejected evidence cannot form the basis of the defence. 20 25

From the evidence of P.W.2 as to what led to the death of the deceased which the trial court believed and that of the appellant which the court rejected, it is clear that no question of self defence arises in this case. The appellant was at no time acting in self defence but rather set out to lure P.W.2 out on the pretext that his motor cycle broke down and needed to be repaired, P.W.2, not realising the appellant's real intention, unsuspectingly followed him. On the way and without any justification whatever, the said appellant attacked P.W.2 and stabbed him. He also attacked and stabbed the deceased who rushed out to the scene in answer to the distress alarm of P.W.2. The deceased died on the spot. In the circumstance, the second issue for determination in this appeal must again be resolved against the appellant. 30 35

With regard to the third issue, the appellant has questioned whether the trial court's judgment affirmed by the Court of Appeal is safe and satisfactory and ought not to be disturbed by this Court having regard to three alleged circumstances. The first of such circumstances is the appellant's claim
5 that the police investigation of the case was "shoddy and wholly unsatisfactory." I have given a close study to this claim by the appellant but find myself unable to agree from printed record of appeal that there was anything wrong, unsatisfactory or abnormal with the police investigation of this case. All that happened in this case from the evidence before the trial court is that the
10 appellant, having trickishly lured out P.W.2, stabbed him on the road. P.W.2 raised an alarm which attracted the deceased to the scene. The deceased when she got to the scene was asking what the matter was when she was also attacked and stabbed by the appellant. She died on the spot. The appellant thereafter went to the Lumene Police Station and lodge the report of an attack
15 on himself P.W.3 who immediately rushed to the scene as a result of the cries of villagers following the murder, also made for the Police Station where he made a report of the incident. The Police duly investigated the case and the appellant was subsequently charged for the murder of the deceased. I am in agreement with the contention of learned respondent's counsel that there is
20 nothing in the police investigation of this case which may even remotely be described as shoddy or unsatisfactory.

It was further submitted on behalf of the respondent that the prosecution failed to call one Dumere Nwako, a witness whose testimony, the
25 appellant alleged, would have decided that case one way or the other. In the first place, I am unable to accept that the said Dumere Nwako is a relevant or material witness and that failure to call her is fatal to the prosecution's case. On the facts of this case as accepted by both the trial court and the court
30 below, only P.W.2 witnessed the incident which led to the stabbing and eventual death of the deceased. It cannot therefore be right that the testimony of the alleged Dumere Nwako would have settled any material issue in respect of the case one way or the other. Secondly, the prosecution is only enjoined by the law to call witnesses sufficient to prove its case beyond reasonable doubt
35 but need not make a case for the defence. See *Insusa Saidu v. The State* (1982) 4 S.C. 41 at 68. It need not also call a host of witnesses on the same point although on a vital point where one witness can settle it one way or the other, he should be called. See *R. v. George Kuree* 7 W.A.C.A. 175 at 177, *Inspector-General of Police v. M. and K. and Another* (1958) WLR 241. and *Onah v. The*

State (1985) 3 NWLR (Pt.12) 236 at 237. The prosecution has the discretion in a criminal case to call whichever witnesses it considers necessary to prove the offence charged but must call vital witnesses whose evidence may determine the case one way or the other. Where, however, it fails to call such a vital witness whose testimony may decide the case one way or the other, it will be presumed that had the witness been called, his evidence would have been unfavorable to the prosecution which failed to call him. See Onah v. The State (supra) and Adamu v. Attorney-General Bendel State (1986) 2 NWLR (Pt.22) 284.

On the accepted facts of this case, only P.W.2, the deceased and the appellant were present when the deceased was stabbed the alleged Dumere Nwako who did not witness the incident cannot therefore be a material witness on any vital point which could settle the case one way or the other.

It was additionally contended on behalf of the appellant that the said Dumere Nwako ought again to have been called by the prosecution for the purpose of corroborating the evidence of P.W.2, I have already stated that Dumere Nwako, on the accepted facts of the case, did not witness the incident and was therefore not a material witness. At all events, the evidence of the one credible witness which is accepted and believed by the trial court is sufficient to justify a conviction unless, of course, such a witness is an accomplice in which case his testimony would require corroboration. See Igbo v. The State (1975) 9-11 SC. 129 at 136 and Ali & Another v. The State (1988) 1 SCNJ 18 at 30. P.W.2 was clearly not an accomplice on the facts of this case. His evidence before the trial court was of such high quality and cogency that the trial Judge accepted the same in its entirety. I agree with the submission of learned respondent's counsel that the court below was perfectly entitled to affirm the conviction of the appellant in this case which was primarily based on the evidence of P.W.2.

It was finally argued on behalf of the appellant that the learned trial Judge shut his eyes to proved facts in favour of the appellant and that the court below erroneously affirmed the decision of the trial court. I need only say from a close study of the record of proceedings that no facts were proved as alleged in favour of the appellant whose testimony the learned trial Judge rightly rejected. I accept the submission of learned respondent's counsel that the prosecution fully discharged the onus placed upon it by law in this case and that the judgment of the trial court which was affirmed by the Court of Appeal is entirely sound and satisfactory and ought not to be set aside. The third issue for determination is therefore resolved against the appellant.

On the whole, I find no merit whatsoever in this appeal and it is accordingly dismissed. The conviction and death sentence passed on the appellant by the trial court and affirmed by the Court of Appeal is hereby further affirmed.

5

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by
10 my learned brother Iguh, J.S.C. I entirely agree that the appeal has no merit and
that it should be dismissed. I, accordingly hereby dismiss the appeal and
affirm the decision of the Court of Appeal.

15

KUTIGIJSC

I read before now the judgment just delivered by my learned brother
Iguh J.S.C. I agree with his reasons and conclusions and will also dismiss the
appeal.

20

MOHAMMED JSC

I have read the draft judgment of my Lord and Learned brother Iguh,
25 J.S.C, and I agree with him that this appeal should be dismissed. From the
facts, I am entirely in agreement with the opinion of Omosun, J.CA., (as he
then was) that the version of the appellant over how the incident happened is
unreliable.

The version the prosecution gave was through the evidence of P.W.2,
30 the brother of the deceased, Mayii Topie. He told the court that the appellant
lured him out on the pretext that his motor-bike was in need of repairs and he
came out with his tools and followed the appellant. The appellant attacked him
not far away from his parent's house. The incident therefore occurred just
outside their family compound.

35 The appellant on the other hand said that he was waylaid by a crowd
near a roundabout on his way to visit his girl friend. What gave the appellant
way and made his story unreliable was the fact that witnesses saw the body of
Mayii Topie just outside her family compound. I am entirely in agreement with
the opinion of Omosun, J.CA. that the learned trial judge was right to reject the

version of the appellant.

I am satisfied that the issues considered in the lead judgment of my learned brother, Iguh, J.S.C, establish beyond any doubt that this appeal is devoid of any merit. The facts of the case point irrefutably to the guilt of the appellant and I am satisfied that the verdict of the learned trial Judge is safe and satisfactory. I would also dismiss this appeal.

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ADIO JSC

I have had the privilege of reading, in advance, the lead judgment just delivered by my learned brother, Iguh, J.S.C., and I agree that the appellant's appeal should be dismissed. There was evidence before the learned trial Judge which proved the charge against the appellant beyond reasonable doubt. The killing of the deceased by the appellant was deliberate and premeditated and none of the usual defences, such as self-defence, was available to the appellant in the circumstances. The conviction of and the sentence imposed on the appellant were justified and the Court of Appeal was right in upholding and affirming them. I too dismiss the appeal.

Appeal dismissed.

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